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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAURICE ALFREDO McGEE, Defendant and Appellant.	A135344 (San Mateo County Super. Ct. No. SC072352)

Defendant Maurice Alfredo McGee appeals from a judgment of conviction following the entry of a no-contest plea to a charge of carjacking and an admission to a special allegation that the offense was a serious felony. He was sentenced to a five-year term in state prison. On appeal McGee claims he is entitled to an opportunity to withdraw his plea because the imposed sentence violated a plea agreement promising him a sentence of three years. We disagree with McGee's contention, and accordingly, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 7, 2010, by a San Mateo County information, McGee was charged with one count of carjacking with a special allegation that the crime was a serious felony (Pen. Code, §§ 215, subd. (a), 1192.7, subd. (c)(27)[1]). He initially pleaded not guilty on December 9, 2010.

[1] All further unspecified statutory references are to the Penal Code.

In August 2011, McGee signed a printed form, entitled "declaration concerning . . . change of plea to guilty or nolo contendere," by which he sought to plead no contest to the carjacking charge and to admit the truth of the special allegation. The declaration indicated, in pertinent part, that McGee understood that the maximum penalty that could be imposed was nine years in state prison.[2] He further indicated he had not been induced to enter a plea by any promise or representation . . . except: "3 year state prison top and refer to probation (court will consider probation due to record & age, if good report)." He also indicated his "understand[ing] that the matter of probation and sentence is to be determined solely by the Court and will not be decided until the report and recommendation by the Probation Department has been considered. [¶] The Court reserves the right to withdraw its consent to any sentence limitation agreement; and in the event, I will be permitted to withdraw my plea(s) of guilty or nolo contendere and all charges will be reinstated."

At the change of plea hearing, the trial court confirmed McGee's understanding of the terms of the plea agreement including, in pertinent part, that "the maximum penalties and consequences for this conviction is nine years in state prison . . . . The court also asked, "Has anyone promised you anything other than the following: [¶] That the matter will be referred to the probation department for the preparation of a presentence memo. At the time of sentencing, the court has indicated, although I cannot promise because it is a serious felony, but I have indicated I will consider all sentencing options including the possibility of probation. If I sentence you to prison, it would be for the low term of three years. However, what you have to understand, Mr. McGee, is that if there is something that has developed in the presentence memo that justifies a sentence greater than three years, you would not be allowed to withdraw your plea. It would have to be information that would be critical to cause me to change my mind. It would also have to be something that I am already not aware of. Do you understand that?" McGee replied, "Yes." In response to the court's query, defense counsel joined in McGee's "waiver."

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[2] The sentence range for carjacking is three years for the low term, five years for the middle term, and nine years for the upper term. (§ 215, subd. (b).)

The court found McGee made a free, knowing and intelligent waiver of his constitutional rights, and ordered the filing of his declaration. McGee then pleaded no contest to the carjacking offense and admitted the offense was a serious felony. Defense counsel stipulated there was a factual basis for the plea based on the police report and the preliminary hearing transcript. The matter was referred to the probation department for the preparation of a presentence report and McGee was directed to report to the probation department and then return to court for sentencing on October 25, 2011.

Two days after entering his plea in San Mateo County, McGee was arrested in San Francisco County based on allegations that he burglarized a home and assaulted the resident. On November 1, 2011, in San Francisco County, he was convicted of possession of stolen property (§ 496, subd. (a)), as a felony offense, and sentenced on that same date to a two-year state prison term to be served in county jail in San Francisco.

After the San Francisco case was concluded, McGee was returned to San Mateo County for sentencing on the carjacking conviction. At the initial sentencing hearing on January 30, 2012, the trial court heard argument from defense counsel, defendant, and the trial prosecutor. The court continued the matter because it needed more information about the San Francisco incident before it could impose sentence. At that time, the court did not think McGee was amenable to probation based on his commission of another felony offense after he had entered a plea to the carjacking offense. The court further commented that although it was free to impose any sentence that the law allowed because there was no "promise," it was not inclined to impose more than the "indicated three-year top." However, if the San Francisco case involved violence, then the court was considering imposing the middle term (five years) on the carjacking conviction.

At the continued sentencing hearing on February 8, 2012, defense counsel informed the court about the circumstances of the San Francisco case and conviction. The court then stated: ". . . I have now reviewed the police report from the San Francisco Police Department. . . . It documents an incident occurring August 17, 2011, in which Mr. McGee was found in a garage of a residence in San Francisco[,] rummaging through property, was confronted by the homeowner, got into a physical altercation with the

homeowner, fled the home, was arrested nearby, found hiding in a portable toilet, had the victim's property on him, and the victims described some of that property as coming from inside of the residence. [¶] Mr. McGee, I made it very clear when you were in my court last on January 30th that what I had been contemplating when you entered your plea was a sentence that might have included probation. I referred it to the probation department with an indicated three-year top. The indicated means that because you pled to a serious and violent felony, the court is prohibited from plea bargaining. As such, the court is not bound by any limitation. But that if at the time of sentencing there were no surprises, that I would not sentence you to anything more than three years in the Department of Corrections, that I would consider something less. Three years was the low term for the [carjacking] conviction that you pled to. [¶] So by considering something less, that means I was open to contemplating a probationary sentence; namely because you were 19 years of age when this offense was committed and being 20 years of age now. [¶] When I learned, however, in reviewing the probation report that you were convicted in San Francisco for another felony offense, that triggered in me my curiosity, and I wanted to know what the facts were underlying that other offense. [¶] When you were here on January 30th I made it very clear to you that if there was any sort of violence involved that I would likely not be limited to my original indication of three years."

In response to the court's statements, defense counsel acknowledged the trial court was not limited to any specific sentence, and based on the probation report McGee had not earned a chance at probation. However defense counsel asked the court to consider imposing a three-year prison term on the carjacking because there was no violence used in that offense, there was some slight pushing of the homeowner in the San Francisco incident, no one was injured in either incident, other than the San Francisco case McGee did not have any adult record, the carjacking conviction was a strike offense, and imposing a three-year term sent a very serious message. The prosecutor did not argue for a specific sentence to be imposed, but commented that the San Francisco incident was an

"aggravated felony," in which McGee had struggled with a home occupant and then struggled with the police as they were attempting to take him into custody.

The trial court imposed a state prison term of five years on the carjacking conviction. In so ruling, the court explained that a probationary sentence was not warranted because of McGee's criminal conduct in San Francisco. The court also found that it would not abide by any indicated sentence of three years because McGee's version of the carjacking incident as reported in the presentence probation report demonstrated his "unwillingness to recognize the propensity for violence that you engage in, and it also demonstrates a total lack of responsibility." After imposing the five-year term on the carjacking conviction, the court resentenced McGee on the San Francisco conviction for possession of stolen property by vacating the previously imposed sentence, declaring the San Francisco offense to be subordinate to the San Mateo offense, and imposing the middle term of two years on the San Francisco offense, to be served concurrently to the sentence imposed on the San Mateo offense. McGee now timely appeals his San Mateo conviction after obtaining a certificate of probable cause.

DISCUSSION

McGee argues he is entitled to an opportunity to withdraw his plea because the trial court's imposition of a five-year prison term on the carjacking conviction violated the plea agreement in which he was promised a term of three years. We disagree.

Initially, we note McGee appears to have misdescribed the plea agreement in this case as a "plea bargain" for a promised sentence of three years in state prison, which was initially approved but later rejected by the court at sentencing. "A plea bargain is a negotiated agreement between the prosecution and the defendant by which a defendant pleads guilty to one or more charges in return for the dismissal of one or more charges. [Citation.] The agreement must then be submitted to the trial court for approval. The court must tell the defendant that the court's acceptance of the proposed plea is not binding, that the court 'may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval,' and that if the court does withdraw its approval the defendant may withdraw the plea. (§ 1192.5.)" (*People*

v. Martin (2010) 51 Cal.4th 75, 79 (*Martin*).) In this case, however, there was no bargaining for a reduced charge and the prosecutor's consent to the plea was neither sought nor required. (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) Instead, McGee pleaded guilty to the sole charge in the information and admitted to the sole special allegation, with the hope of leniency at "the pronouncement of judgment and sentencing." (*People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 915.) When a defendant so pleads, the trial court may indicate "what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea." (*Id*. at pp. 915-916.) The trial court "has made no *promise* that the sentence will be imposed. Rather, the court has merely disclosed to the parties at an early stage – and to the extent possible – what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision." (*People v. Clancey* (2013) 56 Cal.4th 562, 575 (*Clancey)*; see *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1266-1267, fns. 2 & 3 (*Ramos*) [trial court's choice of words (" 'promise,' " " 'commitment,' " " 'consideration for a plea today,' " is not determinative where there is clear and sufficient showing of an " 'indicated sentence' "].) The trial court is not divested "of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence. . . . The development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. Or, after considering the available information more carefully, the trial court may likewise conclude that the indicated sentence is not appropriate." (*Clancey, supra,* 56 Cal.4th at p. 576.) Nevertheless, as in the comparable plea bargaining situation, "if after reviewing the probation report the court [is] not inclined to impose sentence in the terms outlined," then the defendant has the option of withdrawing his plea and "going to trial or accepting harsher treatment on a guilty or nolo contendere plea." (*People v. Superior Court (Felmann*) (1976) 59 Cal.App.3d 270, 273, 276; see, e.g., *People v. Delgado* (1993) 16 Cal.App.4th 551, 555; *Ramos, supra*, 235 Cal.App.3d at p. 1271.) However, for the

reasons we now discuss, the trial court here was not required to give McGee an opportunity to withdraw his plea because the sentence imposed was in accordance with the terms outlined in the plea agreement.

Contrary to McGee's contention, the mention of "3 year state prison top" in his declaration was not a sentence promise by the trial court. Before entry of the no-contest plea, the trial court clarified the sentencing limitation agreement by explicitly eliciting McGee's understanding that he was subject to a maximum term of nine years in state prison, the court would consider all sentencing options, there was no "promise" but an indicated sentence of three years if the court chose to sentence him to prison, and if the court chose to impose a sentence greater than three years after a review of the presentence memo, McGee would not be allowed to withdraw his plea.[3] Thus, "as a matter of substantive law, [the] trial court did not err when it imposed" the five-year term "because [McGee] expressly agreed" the court could impose such a sentence at the time of the change of plea proceeding. (*Martin, supra,* 51 Cal.4th at p. 82, fn. 2.) Consequently, there was no reason for the trial court to give defendant an opportunity to withdraw his plea.

We are not persuaded by McGee's claim that he is entitled to an opportunity to withdraw his plea because he was given contradictory advisements regarding his right to withdraw his plea.[4] Because of these contradictory advisements, McGee argues his case

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[3] We see no merit to McGee's complaint that the trial court did not describe what specific factors might cause it to impose a greater term than three years. By not mentioning any specific factors that might trigger a greater sentence, the trial court "preserve[d] the panoply of procedural protections and rights for the sentencing hearing," and ensured that "the ultimate sentence [would] not be a de facto summary punishment . . . but the result of trial court discretion based on all the circumstances." (*People v. Casillas* (1997) 60 Cal.App.4th 445, 452.)

[4] As noted, in the printed declaration for change of plea form, McGee was advised that if the court withdrew its approval of any sentence limitation agreement, McGee would be permitted to withdraw his plea. However, at the change of plea proceeding, the trial court elicited McGee's understanding that if the court imposed a greater term than three years after review of the presentence memo, then McGee would not be permitted to withdraw his plea based solely on that increase in sentence.

should be considered "comparable to those [cases] where the trial court fails to advise the defendant of his right to withdraw his plea following the [court's] rejection of a plea agreement." However, any contradictory advisements in this case are "of no consequence," because, as we have found, the trial court abided by the plea agreement. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1223.) After considering the information in the presentence probation report, the court sentenced McGee to a term of five years "in accordance with the terms of the plea agreement. The provisions of section 1192.5 that permit a defendant to withdraw his or her plea if the court withdraws its approval of the plea agreement are not implicated, because the court adhered to the terms of the plea agreement by sentencing [McGee] to a prison term that did not exceed (and in fact was less than) the maximum sentence authorized by the plea agreement. . . . " (*Id*. at p. 1224.)[5]

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

[5] In light of our determination, we do not need to address the parties' procedural contentions "regarding preservation or forfeiture of appellate issues." (*People v. Martin, supra,* 51 Cal.4th at p. 82, fn. 2.)